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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 30

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 24, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 901

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS PETITIONERS,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 25, 1935.

[fol. 1]

IN COURT OF CLAIMS

No. E-346

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed May 23, 1925

To the Honorable Chief Justice and the Judges of the Court of Claims:

Your petitioners, the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, parties to the treaty of October 14, 1864 (16 Stat., 707), residing on the Klamath Reservation in the State of Oregon, hereinafter called plaintiffs, respectfully show to the Court as follows:

[fol. 2]

I

By act of Congress approved May 26, 1920 (41 Stat., 623), jurisdiction was conferred upon the Court of Claims with the right of appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of plaintiffs against the United States, and to enter judgment thereon.

The Act is, in words and figures, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims of whatsoever nature which the Klamath and Moadac Tribes of Indians and the Yahooskin Band of Snake Indians, parties to the treaty with the United States, concluded October 14, 1864 (Sixteenth Statutes at Large, page 707), may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said Indians from the United States under any treaties, agree-

ments, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and [fol. 3] determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon.

Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof. The claim or claims of the Indians, or band or bands thereof, may be presented separately or jointly by petition, subject, however, to amendment; suit to be filed within five years after the passage of this Act, and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any band or bands of said Indians, or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits, may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Indians, or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the depart- [fol. 4] ments of the Government shall give access to the attorney or attorneys of said Indians or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians or bands of Indians.

Sec. 3. That if it be determined by the Court of Claims in the said suit herein authorized that the United States

Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation, and the decree of the Court of Claims with reference thereto, when satisfied, shall annul and cancel all claim and title of the said Indians or any other tribe or band of Indians in and to said lands, as well as all damages for all wrongs and injuries, if any, committed by the Government of the United States with reference thereto.

Sec. 4. That upon the final determination of such suit, cause, or action, the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said Indians or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any [fol. 5] sum or sums recovered in such suits or actions, and no part of such fee shall be taken from any money in the Treasury of the United States belonging to such Indians or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: Provided, that in no case shall the fees decreed by said Court amount to more than 10 per centum of the amount of the judgment recovered in such cause.

II

By Act of July 2, 1864 (13 Stat., 355), there was granted to the State of Oregon, to aid in the construction of a military wagon road from Eugene City to the eastern boundary of the State, alternate sections of public lands, designated by odd numbers, for three sections in width on each side of the road. The act contains the following proviso:

"That any and all lands heretofore reserved to the United States by act of Congress, or other competent au-

thority be, and the same hereby are, reserved from the operation of this act, except as it may be necessary to locate the route of said road through the same, in which case the right of way is granted."

On October 24, 1864, the State of Oregon, by Act of its legislature, accepted the grant so made, and designated as [fol. 6] its assignee the Oregon Central Military Wagon Road Company to receive the grant, and to construct the road.

Thereafter, the road, 420 miles in length, was located, constructed and completed between the points named in the Act; and the Governor of Oregon, on January 12, 1870, certified to the Secretary of the Interior his acceptance of the same; after which the lands selected by the said Road Company, pursuant to the provisions of Section 4 of the Act, were certified by the Secretary of the Interior to the State of Oregon.

III

On July 2, 1864, plaintiffs were an Indian tribe occupying, and in undisputed possession of, the following described lands in the State of Oregon:

"Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade Mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters of the north; thence along said dividing ridge in an easterly direction to the southern end of Goose Lake; thence northeasterly to the northern end of Harney Lake; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning."

By Act of March 25, 1864 (13 Stat., 37), the President had been authorized to conclude a treaty with plaintiffs for their country above described, the act providing:

[fol. 7] "That the President be, and he hereby is, authorized to conclude a treaty with the Klamath, Moadoc and Snake Indians in Southeastern Oregon for the purchase of the country occupied by them."

And negotiations therefor were shortly thereafter begun.

By Treaty concluded October 14, 1864 (16 Stat. 707), plaintiffs ceded to defendant the lands above described, saving and reserving therefrom a tract embracing approximately 2,500,000 acres lying within the limits of the cession, a correct description of the boundaries of which is as follows:

"Beginning at the point on the east shore of Upper Klamath lake known as Kalwal, or the Point of Rocks, and running thence in a westerly direction, across said lake, to a point known in the Indian language as Kom-kom-la, or Little Aspen Butte; thence, along the summit of the ridge of mountains lying immediately west of the lake through a point known to the Indians as Posk-nect-ka, or Aspen Butte, to the summit of a mountain known in the Klamath language as Mon-jina; thence in a northerly direction, along the summit of the mountain to Jon-doles, or Klamath Point; thence, in a northerly direction through Bunker Hill to Tum-sum-nina, or Goose Nest; thence, following the summit of the ridge north and east, around the south side of Crater Lake, to Tum-sum-ne, or Mount Scott; thence, north, along the summit of the ridge, through Timber Crater and Summit Point, to Hischok-wal-as, or Mount Thielson; thence, in a northerly direction, along the summit of the ridge, through Hemlock mountain, Tipsee Peak, Mule Butte [fol. 8] and Cow Horn Mountain, to Emigrant Butte; thence, in a northerly direction, along the summit of the ridge, to Ba-la-wisk-se; thence, in a southeasterly direction to Tsne-wheel-sto-e-los, or Walker mountain; thence, in an easterly direction to the summit of Ba-ha, or Bald mountain; thence in a southeasterly direction to the summit of Chok-chok-lisk-se, or Mount Hager; thence, in a southeasterly direction to the summit of Winter Ridge; thence, along the summit of Winter Ridge, in a southerly direction to Wol-lock-se-klos; thence, in a southerly direction to a point called E-o-lum-na; thence, in a westerly direction to the summit of We-leej, or Horse Fly mountain; thence, in a southwesterly direction to the summit of the mountain the extremity of which forms the Point of Rocks; thence, along said ridge to Kal-wal, the point of beginning.

A copy of the Treaty and of the Proclamation thereof by President Grant is hereto attached, marked Exhibit No. 1 and made a part of this petition.

The language adopted by defendant to describe the reservation, as found in Article I of the Treaty, did not correctly embody the agreement between the parties with reference to the reservation boundary, as defendant itself later admitted, but led to three successive erroneous surveys by the Government—one in 1871, one in 1888, and one in 1900.

V

The final location of the right of way of said military wagon road, selected by the Oregon Central Military Wagon Road Company, in 1865, and on which location the road [fol. 9] was ultimately constructed, lay within plaintiffs' reservation lands for a distance of approximately one hundred miles, and for a further distance of approximately fifteen miles it lay within three miles of the reservation line, as shown on Exhibit No. 2 hereto attached.

VI

Plaintiffs show that at no time between July 2, 1864, and June 17, 1901, were their reservation lands public lands, subject to entry under the General Land Laws of the United States; that while it is true the fee simple title thereto was held in trust for them by defendant, they, the plaintiffs, were the sole and exclusive owners of all the said lands up to June 17, 1901, and that, save only as to the location of rights of way over the same, provision for which is found in Article I of the said treaty, reading:

"Provided, also, that the right of way for public roads and railroads across said reservation is reserved to citizens of the United States."

their lands were excluded from the operation of the said act of July 2, 1864, by the following express provision of the act itself:

"That any and all lands heretofore reserved to the United States by Act of Congress or other competent authority, be, and the same are, reserved from the operation of this Act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted."

and, further, by the defendant's express covenant in Article I of the treaty:

[fol. 10] "It is further stipulated and agreed that no white persons shall be permitted to locate or remain upon the reservation, except the Indian Superintendent and Agent, employees of the Indian Department, and officers of the Army of the United States."

VII

By Act of December 26, 1866, the said Act of July 2, 1864, was amended so as to extend the grant, for indemnity purposes, over odd sections, not reserved, within six miles on each side of the road:

"That there be, and is hereby, granted to said State, for the purposes aforesaid, such odd sections or parts of odd sections not reserved or otherwise legally appropriated, within six miles on each side of said road, to be selected by the surveyor-general of said State, as shall be sufficient to supply any deficiency in the quantity of said grant as described, occasioned by any lands sold or reserved, or to which the rights of pre-emption or homestead have attached, or which for any reason were not subject to said grant within the limits designated in said act."

This provision for indemnity afforded the State of Oregon and its assignee ample protection against any loss of lands that might otherwise have arisen out of the location of a part of the road within or adjacent to plaintiffs' reservation.

VIII

Plaintiffs show that notwithstanding the said covenant in the Treaty; and notwithstanding the language of the Act of July 2, 1864, expressly excluding "reserved lands" [fol. 11] from the operation of the land grant provision; and notwithstanding the said amendatory act of December 26, 1866, indemnifying the State of Oregon and its assignees, against loss in the premises, patents for more than 130,000 acres of land within plaintiffs' reservation (in excess of lands required for the right of way of the aforesaid wagon road), to which the Indian title had not yet been extinguished, were allowed by defendant to issue, under the provisions of the Act of July 2, 1864, to citizens of the

United States, without compensation to plaintiffs, and without their knowledge or consent.

IX

The Treaty aforesaid, although executed October 14, 1864, was not proclaimed until in the year 1870; and the first survey of the boundaries of plaintiffs' reservation was not made until in the year 1871; and plaintiffs allege that by reason of these facts, and further by reason of their ignorance of the operation of the public land laws of the United States, they were easily kept in ignorance of the erroneous issuance of patents for lands within their reservation until long after the road was completed and the patents delivered.

X

And while steps were thus being taken in Oregon to vest in citizens of the United States title to large areas of land within plaintiffs' reservation, without compensation to them and without their knowledge or consent, a controversy existed over the matter, between the Indian Bureau and the General Land Office at Washington, D. C., from about the year 1872 up to 1889, as hereinafter shown.

[fol. 12] The contention of the General Land Office was, that because of the delay in the proclamation of the Treaty and in bringing to the attention of the office the matter of irregularity in the issuance of the patents the Indians had lost title to the lands so patented; the contention of the Indian Office, on the other hand, was that until extinguishment of the Indian title the validity of such patents could not be maintained.

Under date of September 12, 1878, the Secretary of the Interior, in replying to a letter from the Commissioner of Indian Affairs, in relation to the status of the Klamath Indian Reservation, says, in speaking of the Oregon Central Military Wagon Road grant:

"Said road was definitely located through the Klamath Indian Reservation October 1, 1865, and on April 2, 1871, and December 8, 1871, this Department certified and allowed to the State of Oregon, in place within the boundaries of the Klamath Indian Reservation, 102,313.19 acres and in the indemnity limits there was certified and allowed to the State, 5,897.08 acres—in all, 108,210.27."

With reference to setting aside the allowances of land within the reservation, the Secretary adds:

"Although this allowance was made by the Department after the treaty made with the Indians October 14, 1864 (16 S., 708), making provision for their reservation by natural boundaries had been proclaimed by the President February 17, 1870, and become a law upon the statute books there does not appear to be any power reposed in this De-
[fol. 13] partment by which it can annul or set aside the allowances of lands situated in the Klamath Indian Reservation which were made to the State of Oregon in 1871."

In further discussing the status of the patented lands the Secretary says:

"I am of the opinion that the Government is not now in the position to bring a suit in a court of competent jurisdiction in order to test the validity of the title to the lands allowed and certified to the State of Oregon under the act of Congress for the use of the Oregon Central Military Road Company and its successors and assigns."

The Secretary concludes his letter by offering the following suggestion in regard to a feasible method of correcting the wrong:

"In view of the existing state of affairs, in relation to the conflicting claims of title to lands situated within and without the boundaries of the Klamath Indian Reservation as defined by the Government survey, approved December, 1871, I am of the opinion that your fourth proposition will be the only feasible solution of the whole matter—that an inspector of your Department be requested to visit the Indians located upon the Klamath Reservation, in the State of Oregon, and ascertain as to whether negotiations can not be entered into, either for the removal of said Indians to a new reservation, the locality of which to be hereafter determined, or of consolidating them with some other Indian tribes already located upon an existing reservation."

[fol. 14] XI

Meanwhile, during the period above named, unsuccessful attempts were being made to find a way, by action of the Department or by the aid of Congress, to remove the Kla-

math Indians from their old home, to vacate their reservation, and to throw it open to white settlement.

XII

By the Act of March 2, 1889 (25 Stat. 850), no effective measures having yet been taken to relieve plaintiffs or to protect their rights in the premises, and the Legislature of Oregon having memorialized Congress on the subject (among other things) of the said road grant, it was made the duty of the Attorney General of the United States, within six months, to cause suits to be brought in the name of the United States against persons or corporations claiming to own or to have an interest in the lands granted to the State of Oregon under the said Act of July 2, 1864 (and other similar acts), to determine the rights of such persons or corporations in the premises.

Suits were instituted under the act in the United States Circuit Court for the District of Oregon. After nearly fifteen years the litigation terminated as follows:

On February 1, 1904, in the case of United States v. California & Oregon Land Co. (192 U. S. 355), the contention advanced by the Attorney General of the United States, on behalf of plaintiffs, was rejected by the court, and the title [fol. 15] in the land grant patentees was upheld and sustained, on the ground that the latter were innocent purchasers.

By this decision plaintiffs were held to have lost title to approximately 130,000 acres of Reservation lands patented under the said Land Grant Act.

Referring to the foregoing decision, the Secretary of the Interior, in a letter on the subject addressed to the Speaker of the House of Representatives, after calling attention to the fact that the title to plaintiffs' erroneously patented lands had been litigated in a case that was three times before the Supreme Court of the United States says:

"The last decision of the Supreme Court was based on the contention in behalf of the Indians that they were not made parties to the previous suits. The only way they could come into court was through the United States, and the Supreme Court very justly said that this and the preceding suits being proceedings in equity, the United States could not continue indefinitely bringing such suits. In

other words, that the entire case should have been disclosed in the original proceedings."

He adds:

"No matter what may be said as to the merits of the Indians' claim to the land, it was not passed on because of the failure of the Government to proceed properly. But the Government's right was fully litigated and the Indians are debarred from further proceedings."

On the subject of the justice of the Indians' cause the Secretary further says:

[fol. 16] "The Indians have complained bitterly and have made, and continue to make, claim for compensation for the lands taken from them. I believe that their claim is just and that they should have reasonable compensation, and I do not believe it fair that they should be compelled to wait for a long term of years and finally employ attorneys to prosecute their claim."

XIII

In October, 1904, in response to a communication from the Superintendent of the Klamath Reservation requesting information, in contemplation of the Supreme Court decision, as to the status of the lands lying within the Klamath Reservation and patented under the provisions of the Act of July 2, 1864, the Secretary of the Interior directed the Superintendent to examine and appraise the said lands and to make report to the Department thereon; but for some reason the report was not submitted.

XIV

By the Act of March 3, 1905 (33 Stat. 1033), the Secretary of the Interior was authorized and directed to ascertain the reasonable value of the lands within the Klamath Reservation conveyed by the United States to the State of Oregon under the Act of July 2, 1864; what part of the same had been allotted to the Indians; and upon what terms the California & Oregon Land Company, owners of the same, would exchange the said lands for other lands within the original boundaries of the Klamath Reservation.

The Act provides:

"That the Secretary of the Interior be, and he is hereby, [fol. 17] authorized and directed to investigate and ascertain the reasonable value of the lands heretofore conveyed by the United States to the State of Oregon as a part of the grant of lands made to said State by the Act of Congress approved July second, eighteen hundred and sixty-four, entitled 'An Act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State,' and embraced within the boundaries of the original survey of the Klamath Indian Reservation in said State, and being the lands involved in the suit of the United States versus the California and Oregon Land Company, decided in favor of said company by the Supreme Court of the United States at the October term, nineteen hundred and three (volume one hundred and ninety-two, page three hundred and fifty-five, of the United States Reports), what part of said lands have been allotted to Indians and the value of the improvements thereon, and also for what price the said California and Oregon Land Company will convey the said lands to the United States, or on what terms the said company will exchange such lands for other lands, not allotted to Indians, within the original boundaries of said reservation.

"And it is hereby made the duty of the Secretary of the Interior to make a full and specific report to Congress, on or before the first day of the next session, in pursuance of the jurisdiction and duties imposed on him by this Act."

Patents for the lands referred to in the Act had been issued on April 2, 1873, to the Oregon Central Military Wagon Road Company; and shortly thereafter the lands were conveyed to the California & Oregon Land Company mentioned in the Act.

[fol. 18] XV

On October 25, 1905, Horace G. Wilson, then the Superintendent of the Klamath Indian Agency, having been directed to procure the information requested by the Secretary of his predecessor in relation to the status of said patented lands; filed a report in writing, submitting the results of his examination and appraisement, in which he announced that he had found heavy pine timber growing on a large part of the lands and that he had appraised the

value of the lands erroneously patented under the said Land Grant Act as a whole at $371,147.48.

XVI

On December 11, 1905, the California & Oregon Land Company, then in negotiation with the defendant for a sale of the said lands to the Government, informed the Secretary of the Interior that it had caused the reservation lands acquired by it under the provisions of the Act of July 2, 1864, aggregating 111,326.83 acres, to be appraised by leading bankers, stockmen and other business men of Klamath County; and that the value thereof had been found to be $903,213.05. The Company then offered to sell the said lands to the Government, as a whole, for $7.50 an acre; and further made an offer for exchange of lands; none of which offers were accepted by the United States.

XVII

By the Act of March 3, 1905, as aforesaid, the Secretary of the Interior was instructed, on or before the first day [fol. 19] of the next session, to make a full and specific report to Congress; and plaintiffs show that it thus became his duty to report in detail all the essential facts in regard to the erroneous issue of patents, of which plaintiffs now complain, under the Act of July 2, 1864, namely, that the same were issued in violation of defendant's covenant in the Treaty, likewise in violation of the terms of the Act of July 2, 1864, itself; that plaintiffs were not informed of the issuance of the patents at the time, and were kept in ignorance thereof until after title had passed to persons held by the Supreme Court of the United States to be innocent purchasers; that plaintiffs had no power to protect themselves in the premises, and were forced to rely upon defendant for protection; that, as stated by the Secretary of the Interior, the failure of plaintiffs' contention in the Supreme Court of the United States was because of the failure of the Government to proceed properly; that by reason of the erroneous issue of the patents, and defendant's failure to defend and protect, plaintiffs had lost title to 111,385 acres of land estimated by the then owners to be worth $903,213.05.

Such report by the Secretary was not made.

XVIII

By the Act of June 21, 1906 (34 Stat. 325, 368), no report having been made to Congress in response to the Act of March 3, 1905, and the Secretary of the Interior having elected not to recommend a purchase of plaintiffs' lands [fol. 20] from the California & Oregon Land Company he was authorized, in his discretion, to exchange certain unallotted lands within the Klamath Indian Reservation, not exceeding 87,000 acres, for the 111,385 acres patented to the State of Oregon, or its grantees, under the said Act of July 2, 1864.

The Act provides:

"That the Secretary of the Interior be, and is hereby, authorized, in his discretion, to exchange the whole of the odd numbered sections and parts thereof in the Klamath Indian Reservation in the State of Oregon, now held in private ownership under the final decree and decision of the Supreme Court of the United States, affirming the title of the California and Oregon Land Company thereto, in the suit of the United States against said company as reported in volume one hundred and ninety-two, at page three hundred and fifty-five, of the decisions of said court, and aggregating one hundred and eleven thousand three hundred and eighty-five acres, for other lands not exceeding eighty-seven thousand acres, situate in one or more compact bodies, in townships thirty-one and thirty-two south, of ranges eleven, twelve, and thirteen east in said reservation, said lands so taken in exchange to be selected, subject to the approval of the Secretary of the Interior.

The Act further provides that in order to facilitate the exchange and the development of the lands to be so taken thereunder—

"there may also be selected in like manner and as part of [fol. 21] the quantity aforesaid other lands in said reservation for the location, construction, and operation of mills and power plants, and with the right to construct railroads, dams, reservoirs, and power-transmission lines, subject to the provisions of existing law and such rules and regulations as the Secretary of the Interior may prescribe thereunder. And when such exchange is effected patents for the lands so selected and approved shall issue therefor."

XIX

Thereafter the Secretary of the Interior concluded an agreement with the California & Oregon Land Company for an exchange of lands, accepting from the Company a deed which restored to defendant, for plaintiffs' benefit, the title to 111,408.08 acres of Klamath Reservation lands, erroneously patented under the Act of July 2, 1864, but granting to the Company, in return therefor, the right to demand patents for 87,000 acres of other, and vastly more valuable, lands lying within plaintiffs' Reservation, approximately all of which 87,000 acres have since been patented to the Company, as hereinafter shown.

XX

Of the 87,000 acres accorded by the Secretary of the Interior to the Company under said agreement, 61,550.82 acres were selected by the Company, and the selection approved by the General Land Office, on October 22, 1906; 23,669.01 acres were selected and the selection so approved June 16, 1910, leaving a balance of 1,780.17 acres to be selected, the disposition of which is at the present time to plaintiffs unknown.

[fol. 22] The lands so selected by, and patented to, the California & Oregon Land Company, under the last named agreement, were and are, for the most part, covered with a heavy growth of valuable pine timber, estimated at approximately 2,000,000 thousand feet, reasonably worth $3.00 a thousand, or $6,000,000.00.

XXI

The agreement with the California & Oregon Land Company for exchange of lands, having been concluded as aforesaid, and patents for 61,550.82 acres of other Reservation lands, having been issued by defendant to the Company in 1906, the Secretary of the Interior recommended to Congress that an appropriation of $108,750 be made to plaintiffs for the 87,000 acres of their lands taken to settle the demands of the California & Oregon Land Company.

In his recommendation, the Secretary says:

"It may be difficult to determine the exact value of the Indians' right, but certainly it is worth $1.25 an acre, and

I have, therefore, caused a draft of an item to be prepared to compensate them for the lands taken by reason of the transactions under consideration at the rate of $1.25 an acre, which is enclosed.

"Few Indians are as deserving as the Klamaths and few have had as just cause to complain of the delays that have occurred in settling their claims. I, therefore, earnestly urge that this measure become law."

XXII

Thereafter by the Act of April 30, 1908 (35 Stat. 70, 92), there was appropriated by Congress the said sum of $108,- [fol. 23] 750 to pay plaintiffs for the 87,000 acres of land so conveyed to the California & Oregon Land Company, on condition that they "execute a release of any claims or demands of every kind against the United States for the land involved."

This sum was far below the reasonable value of the lands, and plaintiffs accepted it only under the strongest protest, and upon the assurances of the Superintendent in charge of the Agency that in doing so they did not preclude themselves from recovering from the Government of the United States any difference between the sum so received and the reasonable value of their lands.

XXIII

Plaintiffs further allege that shortly after April, 1908, they began to renew their appeals to the Government for an equitable settlement of their tribal claims growing out of the erroneous issue of patents to lands within their reservation and of the erroneous boundary surveys.

These appeals were at first made to the Secretary of the Interior, directly or through their Agency Superintendent, by letter, petition, memorial, and in person.

Finally, plaintiffs, failing in these efforts, decided to appeal to Congress for assistance. Delegates were chosen by tribal councils and were sent to Washington, year after year, at heavy expense, with the result that at the 66th Congress, 2d Session, the Act (41 Stat. 623) was passed authorizing plaintiffs to submit their claims, legal and equitable, to this court, the act, in its terms, providing:

[fols. 24-37] "Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein,

both legal and equitable, of each and all the parties thereto notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions."

Under this Act plaintiffs submit their claim herein set forth, alleging that by reason of the exchange of their reservation lands with the California & Oregon Land Company, and the conveyance to the Company of 87,000 acres of plaintiffs' most valuable lands, they are entitled to have and recover $6,000,000, less any part of the said appropriation of $108,750 that has been paid to them or used for their actual benefit.

Wherefore, plaintiffs pray judgment for the sum of $5,891,250 together with such other and further sums as, upon a hearing, may be found due them for the value of the said 87,000 acres of land.

The Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, by Daniel B. Henderson, Attorney of Record. C. M. O'Neill, John Irwin, G. Carroll Todd, of Counsel.

Duly sworn to by Daniel B. Henderson. Jurat omitted in printing.

[fol. 38] II. General Traverse—Filed July 22, 1925

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission of Case

On May 8, 1934, this case was argued and submitted on merits by Mr. G. Carroll Todd, for the plaintiffs, and by Mr. Wilfred Hearn, for the defendants.

IV. History of Proceedings

On November 5, 1934, the court filed special findings of fact, conclusion of law and entered a judgment dismissing the petition, with an opinion by Booth, Ch. J.

[fol. 39] On November 24, 1934, the plaintiff filed a motion for new trial and to amend findings.

On November 28, 1934, the defendant filed a motion to amend special findings of fact.

On April 8, 1935, the court entered the following order on said motion:

Order

This case comes before the court on the plaintiffs' motion for a new trial and on the defendant's motion to amend findings.

On consideration thereof it is ordered this 8th day of April, 1935, that said motion for new trial be and the same is denied. The motions to amend findings are allowed in part and overruled in part. The former findings are withdrawn and amended findings this day filed—the judgment and opinion to stand.

[fol. 40] V. **Amended Special Findings of Fact, Conclusion of Law and Opinion of the Court by Booth, Ch. J.**—Filed April 8, 1935

Mr. G. Carroll Todd for the plaintiffs. Messrs. Daniel B. Henderson, John Irwin, and C. M. O'Neill were on the briefs.

Mr. Wilfred Hearn, with whom was Mr. Assistant Attorney General Harry W. Blair, for the defendant. Mr. George T. Stormont was on the briefs.

This case having been heard by the Court of Claims, the court upon the evidence makes the following

Amended Special Findings of Fact

I

An act of Congress, approved May 26, 1920, 41 Stat. 623, provides:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims of whatsoever nature which the Klamath and Moadac Tribes of Indians and the Yahooskin Band of Snake Indians, parties to the treaty with the United States, concluded October 14, 1864 (Sixteenth Statutes at Large, page 707), may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon.

"Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstand-[fol. 41] ing lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof. The claim or claims of the Indians, or band or bands thereof, may be presented separately or jointly by petition, subject, however, to amendment; suit to be filed within five years after the passage of this act, and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any band or bands of said Indians, or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits, may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Indians, or any bands thereof, shall set forth all the facts on which the claims for recov-

ery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indians or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians or bands of Indians.

"Sec. 3. That if it be determined by the Court of Claims in the said suit herein authorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation, and the decree of the Court of Claims with reference thereto, when satisfied, shall annul and cancel all claim and title of the said Indians or any other tribe or band of Indians in and to said lands, as well as all damages for all wrongs and injuries, if any, committed by the Government of the United States with reference thereto.

"Sec. 4. That upon the final determination of such suit, cause, or action, the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said Indians or any band thereof in any suit, cause, or action under the provisions of this act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of such fee shall be taken from any money in the Treasury of the United States belonging to such Indians or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: Provided, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause."

[fol. 42]

II

In 1864 the plaintiffs held by immemorial possession a large area of land, over 20,000,000 acres, located in what are now the States of Oregon and California. Their title was not disputed.

III

By an act of Congress approved March 25, 1864, the President was authorized to conclude a treaty with the plaintiffs "for the purchase of the country occupied by them."

IV

On October 14, 1864 (16 Stat. 707), a treaty was concluded between the plaintiffs and the United States for the cession of their lands to the United States. Article I of that treaty is in part as follows:

"Provided, That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians [and] held and regarded as an Indian reservation, * * * and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians aforesaid: Provided, also, That the right of way for public roads and railroads across said reservation is *guaranteed*. [reserved] to citizens of the United States."

Article XI of the treaty provides as follows:

"It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty."

V

By an act approved July 2, 1864, Congress granted to the State of Oregon, to aid in the construction of a military road from Eugene City to the eastern boundary of the State, alternate sections of public lands, designated by odd numbers, for three sections in width on each side of the

road, with the proviso, "that any and all lands heretofore reserved to the United States by act of Congress, or other competent authority, be, and the same are, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted." On October 24, 1864, the Legislature of Oregon accepted this grant and assigned it to the Oregon Central Military Road Company, which undertook to construct the road. The right of the State to make such an assignment was recognized by the act of Congress of June 18, 1874.

VI

In 1867, 1871, and 1873, pursuant to the act mentioned in the finding next preceding, patents were issued to the State of Oregon and the Oregon Central Military Road Company for 402,240.67 acres of land, which, by intermediate conveyances, ultimately became vested in the California & Oregon Land Company (United States v. Ore. Cent. Mil. Road [fol. 43] Co., 140 U. S. 599, 617, 620; United States v. Calif. & Ore. Land Co., 148 U. S. 31, 34). Of these 402,240.67 acres, 111,385 acres, exclusive of land required as a right of way for the road, were within the admitted boundaries of the lands reserved to the plaintiffs by the treaty of October 14, 1864.

VII

By an act approved March 2, 1889, Congress directed the Attorney General to bring suit to forfeit the grants of lands under the aforesaid act of July 2, 1864, for noncompliance with the conditions of the grants, "saving and preserving the rights of all bona fide purchasers of either of said grants * * * if any such there be."

The Attorney General brought the suit, alleging as grounds for forfeiture that the road was not in fact constructed, that the certificates of the Governor of Oregon on which the patents to the lands were issued were fraudulently obtained, and that the California & Oregon Land Company and its transferors took conveyances of the lands with knowledge of these facts. It was decided, however, that the California & Oregon Land Company was a purchaser in good faith and that its title was valid. (United States v. Calif. & Ore. Land Co., supra.)

Thereafter another suit was brought by the United States against the California & Oregon Land Company to recover that part of the lands in question which was within the Klamath Indian Reservation, on the ground that by the terms of the act of July 2, 1864, those lands were expressly excepted from the operation of the grant. The Supreme Court decided that this issue could have been raised in the first suit and therefore was res adjudicata, and dismissed the bill. (United States v. Calif. & Ore. Land Co., 192 U. S. 355.)

The lands thus lost to the plaintiffs were located in a part of their reservation which had been allotted to the members of the tribe in severalty.

VIII

In a report to Congress on this matter the Secretary of the Interior said:

"The last decision of the Supreme Court was based on the contention in behalf of the Indians that they were not made parties to the previous suits. The only way they could come into court was through the United States, and the Supreme Court very justly said that this and the preceding suits being proceedings in equity, the United States could not continue indefinitely bringing such suits. In other words, that the entire case should have been disclosed in the original proceedings. No matter what may be said as to the merits of the Indians' claim to the land, it was not passed on because of the failure of the Government to proceed properly. But the Government's right was fully litigated, and the Indians are debarred from further proceedings.

"The Indians have complained bitterly and have made, and continue to make, claim for compensation for the lands taken from them. I believe that their claim is just and that they should have reasonable compensation, and I do not believe it fair that they should be compelled to wait for a long term of years and finally employ attorneys to prosecute their claim."

[fol. 44]

IX

By an act approved March 3, 1905, Congress directed the Secretary of the Interior to ascertain the reasonable value

of these lands, describing them as lands "embraced within the boundaries of the original survey of the Klamath Indian Reservation", and also to ascertain for what price the California & Oregon Land Company would convey them back to the United States, or on what terms it would exchange them for other lands within the boundaries of the reservation not theretofore allotted to individual members of the Klamath Tribe.

X

The Secretary of the Interior having made no report in the meantime, Congress, by an act approved June 21, 1906, authorized the Secretary to give in exchange for these lands unallotted lands within the Klamath Reservation not exceeding 87,000 acres.

Under this authority the Secretary, on July 26, 1906, concluded an agreement with the California & Oregon Land Company, pursuant to which these lands were conveyed back to the United States by deed dated August 22, 1906, and in return the United States conveyed to the California & Oregon Land Company 87,000 acres of other lands, not allotted, within the Klamath Reservation.

This was done without the knowledge or consent of the plaintiffs and without making compensation.

XI

These 87,000 acres were covered, for the most part, with a heavy growth of merchantable pine timber. A cruise of the timber made in 1906 at the time of the exchange showed approximately 1,713,000,000 feet.

In 1906 the value of this tract to the Indians residing on the reservation, under the title possessed by them, was $2,980,000.

XII

On November 2, 1907, the Secretary of the Interior sent to the Secretary of the Treasury a tentative draft of a bill appropriating $108,750.00 to be paid the plaintiff Indians as compensation for the taking of the 87,000 acres. In a letter accompanying the draft of this bill the Secretary said:

"It may be difficult to determine the exact value of the Indians' right, but certainly it is worth $1.25 an acre, and

I have therefore caused a draft of an item to be prepared to compensate them for the lands taken by reason of the transactions under consideration, at the rate of $1.25 an acre, which is inclosed."

This bill and letter were thereafter forwarded by the Secretary of the Treasury to the Speaker of the House of Representatives.

By act approved April 30, 1908 (35 Stat. 70, 92), Congress appropriated the sum of $108,750 in payment to plaintiffs for the 86,418.06 acres of land taken from the reservation as aforesaid. That act is as follows:

"That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred and eight thousand seven hundred and fifty dollars, or so much thereof as may be necessary, to pay the Indians of the Klamath Agency for the lands conveyed [fol. 45] to the California and Oregon Land Company, in accordance with the provisions of the act of June twenty-first, nineteen hundred and six (Thirty-fourth Statutes at Large, pages three hundred twenty-five and three hundred sixty-eight), said sum to be deposited in the Treasury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purposes as the Secretary of the Interior may prescribe: Provided, That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved."

XIV

The Commissioner of Indian Affairs transmitted a form of release in the language of the statute to the Superintendent of the Klamath Agency with the instruction, "This release should be executed in your presence by a majority of the Indians on the reservation and should be certified to by you as the action of such majority."

XV

[1] In 1908 the total Indian population of the Klamath Reservation was 1,038, of whom 640 were adults (287 men and 353 women). The adult males were alone allowed to vote

in Indian councils. The Superintendent of the reservation called for a council of the Indians to assemble at the general agency headquarters on December 5, 1908, for the purpose of considering compliance with the act of April 30, 1908. The Indians were duly notified of this council in the usual way and for a sufficient time in advance of the same to bring such notice to them.

XVI

The council assembled in pursuance of the notices and was attended by 200 or more Indians. The Superintendent of the reservation presided and explained to the Indians the terms of the act of 1908 and what they would have to do to get the money appropriated. An Indian interpreter followed him and interpreted in their native tongue what he had said to them. Some opposition to signing the required release developed, but in the end the release was signed by 100 or more Indians present. The Superintendent was not in accord with the amount appropriated to compensate the Indians, and he neither did nor said anything to mislead the assembly. He had recommended the appropriation of a much larger sum.

XVII

The same proceedings as noted in finding XVI in a general way were observed at a place called Yainax, where a subagency of the reservation had been established, and additional signatures to the release were obtained. Yainax was some forty or fifty miles distant from the general agency, and Indians from this section of the reservation rarely ever attended councils at the general agency headquarters. The release was signed by 150 adult male members of the Indians on the reservation.

[fol. 46] XVIII

On January 6, 1909, the Secretary of the Interior received from Horace G. Wilson, the agency superintendent of plaintiffs' reservation, a release signed by 150 adult male Indians of the reservation, the release being as follows:

"Whereas by an item in the Indian Appropriation Act approved April 30, 1908 (Public, No. 104), there is ap-

propriated the sum of one hundred eight thousand seven hundred and fifty dollars ($108,750.00), or so much thereof as may be necessary to pay the Indians of the Klamath Agency for the land conveyed to the California and Oregon Land Company, in accordance with the provisions of the act of June 21, 1906 (34 Stat. L. 325-368), which sum is to be deposited in the Treasury of the United States to the credit of said Indians and expended for their benefit in such manner and for such purpose as the Secretary of the Interior may prescribe; and

"Whereas it is provided in said act—

"That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved:

"Now, therefore, the undersigned, being a majority of the Indians of the Klamath Reservation in council assembled, do hereby relinquish any and all claims and demands of every kind and character which they now have or may hereafter have against the United States for the lands involved."

XIX

Upon the acceptance of the foregoing release by the Secretary of the Interior as a sufficient compliance with the provisions of the act of April 30, 1908, the said sum of $108,750 was placed in the Treasury to the credit of plaintiffs, and no claim has been made by plaintiffs for compensation in addition to that specified in said act and release pursuant thereto, save and except through the petition herein filed.

XX

In 1906 the timber on the 87,000-acre tract was worth at least $1.50 per thousand feet. The Commissioner of Internal Revenue in determining the value of the timber as of March 1, 1913, for income-tax purposes, valued the 87,000 acres at $3,550,000. In 1918 the Oregon Land & Live Stock Company, the then owners of the lands, sold the same to the Long-Bell Lumber Company for $3,700,000. The timber on the tract was as good as that in any section of this country, both from the standpoint of quality and logging facilities.

XXI

The United States is entitled to set-offs, under the jurisdictional act, of $1,978,431.24. There is not included in the set-off the sum of $242,932.94 expended for the benefit of the Indians subsequent to the jurisdictional act of 1920, and also there is omitted from the defendant's counterclaim all sums expended for the benefit of the Indians under treaty provisions during the periods the United States was obligated to disburse the same.

[fol. 47] There is also eliminated from the defendant's counterclaim the sum of $11,210.51 for medical supplies furnished the Indians. The treaty provided that they should be furnished a doctor.

The sum of $172,275.83 is likewise deducted from the defendant's counterclaim, the amount expended for the benefit of the Moadoc Indians while living on the Quapaw Reservation in Indian Territory.

The sum of $26,290.56, expended for building materials, hardware, paints, oils, and glass, is also deducted from the defendant's counterclaim as being required to be disbursed under the treaty.

The expenses of surveying the Klamath Indian Reservation and allotting lands to certain allottees, amounting to $63,115.78, are not chargeable to the Indians under the treaty, and the sum of $11,732.62 is a liability of the Government under Article VI of the treaty.

The sum of $12,589.89, used to purchase agricultural implements, feed for livestock, and seeds for planting, is not proved to have been exclusively for the benefit of the Indians, and falls within the terms of the treaty.

The total sum of the defendant's counterclaim is $2,652,181.49, and from this sum the court subtracts $673,750.25, leaving a balance of $1,978,431.24 chargeable to the Indians.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are not entitled to recover, and the petition is therefore dismissed.

OPINION

BOOTH, Chief Justice, delivered the opinion of the court:

The special jurisdictional act of May 26, 1920 (41 Stat. 623), which refers this Indian case to the court, is found in finding I. One provision of the act is of vital importance in the decision of the case and will hereafter be quoted in full and discussed; it is not essential to set forth in this opinion the entire act.

The petition in this case was filed on May 23, 1925. Evidence on the part of the plaintiffs was not completed until July 25, 1933. The testimony of some fifty or more witnesses was taken by the parties during the years 1928, 1930, 1931, and 1932. The last report of the Treasury Department was filed August 15, 1932. The report of the General Accounting Office, involving a detail computation and examination of all expenditures and appropriations made for and on behalf of the plaintiffs from 1864 to 1920, was filed December 7, 1933, a document voluminous and indispensable to the disposition of the case, made so by the right of the defendant to interpose a counterclaim, and one which could not be unduly expedited.

On five different dates the court on its own motion placed this case upon the trial calendar for trial, and upon each date, except the last, a motion was made to remand the case to the general docket because not then ready for trial, both parties conceding the fact. The case being finally briefed was placed on the May calendar and argued and submitted May 8, 1934. We recite these facts as demonstrative of the inherent difficulties which attend litigation of this character and illustrative of the factor of delay in their disposition. The case is one of importance, involving acute disputation as to certain facts and important legal questions.

[fol. 48] The Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians claimed by occupancy an immense tract of land located in what are now known as the States of Oregon and California. March 25, 1864 (13 Stat. 37), Congress authorized the President to negotiate and if possible conclude, a treaty with them. October 14, 1864 (16 Stat. 707), a valid treaty was concluded, by the terms of which the plaintiff Indians ceded to the United States all of their lands theretofore claimed by them, except a defined and delimited tract of about 2,500,000 acres in the State of

Oregon set aside to them as a reservation, known as the Klamath Indian Reservation and upon which they now reside.

On July 2, 1864, about four months prior to the conclusion of the treaty of October 14, 1864, Congress had passed the donation act, found in 13 Stat. 355. This statute donated to the State of Oregon alternate sections of public lands, three sections in width, on each side of a proposed military road which the State intended to construct from Eugene City on its western boundary extending across the State to the eastern boundary thereof.

The State of Oregon accepted the grant as in aid of the construction of the road, and thereafter, on October 24, 1864 (18 Stat. 80), assigned to the Oregon Central Military Road Company all of the lands included in the grant, which company proceeded with the work of building the road, later, however, assigning and conveying to the California and Oregon Land Company all the rights and title to the lands involved, and this company completed the road. The United States in the years 1867, 1871, and 1873 issued to the road company patents for 402,240.67 acres of land covering the above donation.

Following the acquisition of title to the lands by the land company it was discovered that included within the acreage patented to it were 111,400.08 acres of Indian lands; i. e., lands which were included under the treaty of October 14, 1864, within the Klamath Indian Reservation, belonged to the Indians, and a substantial portion of which had been duly allotted to certain members of the tribe (34 Stat. 325). It had not been the intention of Congress to include within the donation of public lands any portion of the Klamath Indian Reservation, and when the mistake in so doing was discovered the United States set in motion exhaustive efforts to correct the error. Three suits were commenced by the United States against the land company in an effort to annul the patents to the Indian lands. This litigation, which extended over a long period of time and with respect to which we need only cite the result, is found in the following cases: United States v. Oregon Central Military Road Company, 140 U. S. 599; United States v. California and Oregon Land Company, 148 U. S. 31, and the final case involving the same parties, in 192 U. S. 355, wherein the title of the land company to all the lands included within the patents was confirmed and the issue put at rest.

The situation then in February 1904, as a result of the decision of the Supreme Court of that date, was that the Indians residing on the Klamath Reservation suffered a diminution of their reservation to the extent of 111,400.08 acres of land, and the allottees the loss of their allotments. Congress very promptly sought to rectify the error and injustice resulting from the donation act of July 2, 1864, and on March 3, 1905 (33 Stat. 1033), passed an act direct- [fol. 49] ing the Secretary of the Interior to ascertain the value of the 111,400.08 acres of Indian lands included within the donation act and discover for what price the California and Oregon Land Company would be willing to convey the same to the United States, or on what terms the land company would be willing to exchange the same for other unallotted lands within the reservation.

Eventually an exchange of lands was brought about, the land company conveying to the United States the 111,400.08 acres, thus restoring the same to the reservation and accepting in lieu thereof about 87,000 acres of unallotted and immensely valuable timberlands in another section of the reservation. This exchange was concluded on August 22, 1906, in accord with the provisions of the act of June 21, 1906 (34 Stat. 325, 368), and manifestly resulted in a diminution of the reservation to the extent of 87,000 acres of land. The act of June 21, 1906, supra, made no provision for the payment to the Indians for the taking of this tract of land.

On November 2, 1907, the Secretary of the Interior transmitted to the Secretary of the Treasury the draft of a bill appropriating $108,750 as compensation to the Indians for the loss of the 87,000 acres. On the same date the Secretary advised the Speaker of the House that the lands were "certainly worth $1.25 per acre." April 30, 1908 (35 Stat. 70, 92), Congress appropriated $108,750 to be paid the Indians for the lands, a proviso to the act stating "That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved."

In December 1908 the superintendent of the reservation assembled a council of the Indians at the general agency of the same. Ample notice of the council was given by deputizing the Indian police to proclaim the fact and by posting notices thereof. The Indian population of the reservation

on this date was 1,038, of whom 640 were adults (287 males and 353 females). Some 200 or more Indians responded to the call, and the superintendent in their presence explained the purpose of the meeting and what was essential for them to do if they wished to obtain the benefits of the appropriation. In addition to his address in English an Indian interpreter explained in their native tongue what the superintendent had said. Some opposition to signing the release appeared from a decided minority. The grievance uttered was not so much as to the inadequacy of the appropriation but was addressed to a fear that what was being done was not in accord with the wishes of the Department. At any rate, the one Indian as spokesman of the opposition finally signed the release, and it is certain that at least one hundred adult male Indians signed at this meeting.

The Klamath Reservation is in area extensive, and because of this fact a subagency had been established at the well-known place of Yainax on the reservation. The Indians residing at and near Yainax rarely visit or attend council meetings at the general agency some forty or fifty miles distant. The superintendent visited Yainax, and before an assembly of Indians there repeated the procedure at the general agency, with the result that the release was eventually signed by 150 adult male Indians. It may be, although extremely doubtful, that some Indians were approached individually with respect to the matter. The Indian testimony so indicates, but the room for error in [fol. 50] their testimony clearly demonstrates that they may be and probably are mistaken.

The superintendent certified to the Secretary of the Interior that the lease had been executed, and the same was thereafter approved by the Department. The appropriation being immediately available, the same was credited on the books of the Treasury and expended for the benefit of the Indians, and they accepted without protest or complaint the items for which it was expended.

One claim now prosecuted under the jurisdictional act is for just compensation for the 87,000 acres of land taken in 1906. To sustain a cause of action and avoid the legal consequences of the release given, the plaintiffs contend that the following provision of the jurisdictional act is in effect a waiver upon the part of the United States of a defense predicated upon the conclusiveness of the release

and that the same may not be pleaded as an estoppel to the suit. The provision reads:

"That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto notwithstanding the lapse of time or statutes of limitation, *and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions,* and the United States shall be allowed credit for all sums, including gratuities, heretofore paid or expended for the benefit of said Indians or any band thereof. * * * (Italics inserted.)

The concluding clause of the release of 1908 is as follows:

"Now, therefore, the undersigned, being a majority of the Indians of the Klamath Reservation in council assembled, do hereby relinquish any and all claims and demands of every kind and character which they now have or may hereafter have against the United States for the lands involved."

The plaintiffs obviously concede that, save for the alleged waiver of the same, the defense of estoppel was available to the United States. Many Indian cases are cited in the briefs. To review them separately would involve a repetition of familiar legal principles and a prolongation of this opinion to tedious length. The fundamental legal basis prescribed by the Supreme Court for the construction of special jurisdictional acts in Indian cases is concisely expressed in the Mille Lac Indian case, 229 U. S. 498, 500, as follows:

"The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians."

In Price v. United States and Osage Indians, 174 U. S. 373, 375, the Supreme Court said:

"The right of the plaintiff to recover is a purely statutory right. The jurisdiction of the Court of Claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed by the Government, or the Indian tribe, whose members were guilty of this depredation, we [fol. 51] cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume. It is useless to cite all the authorities, for they are many, upon the proposition. It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it. See, among other cases, Schillinger v. United States, U. S. 163, 166, in which this court said: 'The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government.'"

Tribal Indians may not sue the United States in this court except by special jurisdictional acts, and obviously all such litigation would be barren of results if the United States did not preclude the defense of the statute of limitations. In the Choctaw case, 19 C. Cls. 243, decided in 1881, Congress in the special act by words of indubitable meaning, i. e.: "Power is hereby granted the said court to review the entire question of differences de novo, and it shall not be estopped by any action had or award made by the Senate of the United States in pursuance of the treaty of eighteen hundred and fifty-five," waived the defense of estoppel which involved a previous award made to the Indians. Uniformly the court's jurisdiction has been limited to claims "growing out of treaties, agreements, and acts of Congress." The litigation has involved controversies with respect to the failure of the United States

to observe treaty stipulations, discharge contractual obligations, and comply with the provisions of acts of Congress.

A review of the many cases decided by this court discloses, we think, that when Congress intends to waive a defense it has left no room for doubt the intention. While it is true that special jurisdictional acts in Indian cases extend to the point of extreme liberality as to the subject matter to be adjudicated and involve large sums of money, nevertheless the court is not by implication to extend the scope of the act if in its opinion the language of the same does not warrant the construction. When Congress intends, as the cases indicate, to waive the effect of settlements and awards, apt language is used to accomplish the purpose. Delaware cases, 72 C. Cls. 483; Id. 525; 74 C. Cls. 368.

A precedent long ago established inhibits this court under special jurisdictional acts from adjudicating any Indian claims depending for their validity upon the setting aside or abrogation of any article of a treaty. United States v. Weld, 127 U. S. 51; Old Settlers case, 148 U. S. 427; Lone Wolf v. Hitchcock, 187 U. S. 553. Plaintiffs' contention embraces the necessity of setting aside a referendum settlement and trying the entire issue de novo. Congress was unwilling to consummate the payment until the Indians by a majority of the male adults had signified their satisfaction therewith, and the language of the appropriation act clearly and unmistakably discloses that it was to be not only a satisfactory but a final settlement for the lands taken. To revive a liability once satisfied and [fol. 52] expressly released exacts language in the act which leaves no room for doubt, and especially is this true when the contemporaneous policy of the United States was to effect, if possible, conclusive agreements with the Indians in making settlements.

Assuredly this clause of the special act is not meaningless. Congress in inserting it intended some remedial purpose. Payment upon a claim may be made without exacting a written release of the same, and when made may raise the issue as to whether it extinguishes the liability involved or was only a partial one. Indian controversies under special jurisdictional acts universally involve an alleged failure to accord the Indians what treaties, agreements, and

acts of Congress gave to them, and the instances are many where the cause of action involves payments made.

A settlement and release of a claim is something different in law from a "payment upon a claim." A release of a claim results in a legal relationship of the parties distinct from a payment upon or of a claim without signing a release. In many instances the Department of the Interior either disburses money to the Indians or deposits same in the Treasury to their credit, acting upon a settled conviction that by so doing they are discharging in full the liability of the United States under treaties, agreements, and acts of Congress, and the disbursements so made are accepted by the Indians and acquiesced in for a long period of time.

Subsequently a controversy arises as to whether the payments made as above, although accepted and acquiesced in as in full, were in fact and in truth sufficient in amount under the documents setting out the liabilities to discharge the same. Suits involving issues of this precise character are numerous in this court. One generation of Indians accepts payments without complaint; a succeeding one challenges them as not being in full. This, we think, is, as before observed, quite different from a transaction where the parties meet in council, discuss and determine a claim, and in accord with the congressional act offering the settlement accept the same and release the United States from all further or additional liability for the same. In one instance the act of payment emanates from an administrative officer of the United States; in the other it is the solemn proceedings of the parties themselves, and discharges an assumed liability.

Therefore it seems to us that what Congress intended by a waiver of the defense of estoppel predicated upon payments made upon a claim was not to preclude the United States from proving that a payment made discharged the liability. To establish this fact the burden was put upon the defense, and the fact of payment did not relieve the issue from proof upon the merits. It, we think, did not refer to a settlement, an extinguished liability, but to an outstanding claim.

In this case we have not only a payment made and accepted, but a written release, comprehensive in terms, which was intended to and did extinguish any existing liability.

No future claim could be based upon the transaction unless Congress waived the legal effect thereof. The issue here is not alone one of payment working an estoppel, but the setting aside of a release which admittedly closed the transaction and extinguished all liability under the claim. If Congress intended to nullify a release it would have used lan- [fol. 53] guage clearly evidencing that intention. In the choice of legal terms we cannot assume that Congress intended to set aside a release by using the words "payment upon a claim." Judicial precedents, quite familiar, limit the court in construing special jurisdictional acts to "the plain letter of the law conferring jurisdiction." In the Blackfeather case, 190 U. S. 368, 376, the Supreme Court said:

"As these statutes extend the jurisdiction of the Court of Claims and permit the Government to be sued for causes of action therein referred to, the grant of jurisdiction must be shown clearly to cover the case before us, and if it do not, it will not be implied. Statutes of this nature extending the right to sue the Government will generally be strictly construed."

See also the Osage case, 174 U. S. 373, and Choctaw Nation case, 179 U. S. 494.

While not conclusive, another fact disclosing the extent to which Congress was willing to go in conferring jurisdiction upon this court in this case, as well as the subject matters before that body, is evidenced by the report of the House committee in charge of the same, a report also adopted by the Senate committee. In these reports this claim is not mentioned by the committees, and what is more, an extended memorial of the Indians setting forth their claims against the United States and praying for a special act to enable their prosecution, makes no reference nor mention whatever of a claim for compensation for the 87,000 acres of land involved in this case.

In addition to what has been said, the opinions of this court in the Creek Nation cases, 63 C. Cls. 270, 77 C. Cls. 226, as well as in the Delaware Indian cases, supra, with respect to construing special jurisdictional acts in Indian cases, are apropos. The court, without quoting the language, held that only such claims as grow out of treaties, agreements, or acts of Congress, come within the jurisdic-

tion conferred, and that the acts did not confer authority to abrogate a treaty, set aside its articles and award judgment accordingly, because obviously a claim could not grow out of a treaty if its origin were founded upon an abrogation of the treaty itself. In the Delaware cases Congress, in language which could not be misunderstood, conferred jurisdiction "to consider all such claims de novo." The claim in suit does not grow out of an agreement; it can only obtain validity by setting aside a release, a settlement.

In answer to the above the plaintiffs state: "The claim sued upon is not presented as a claim arising under any treaty or agreement but as one in the broad category of 'claims of whatsoever nature which the Klamath and Moadac Tribes of Indians * * * may have against the United States * * * for the failure of the United States to pay said Indians any money or other property due', i. e., money due them as just compensation for the taking of the 87,000 acres." The quotation from the jurisdictional act is not complete. The act recites, in addition to the above, that our jurisdiction shall extend to the "determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress." It was a law of Congress which effected the tranfer of the 87,000 acres of reservation lands, and it was another law of Congress which effected the settlement therefor. Congress, and Congress alone, possessed the authority to do what was done, and Congress was the only source from which the Indians could upon terms imposed receive [fol. 54] compensation. Save for acts of Congress, this claim would not have arisen. Lone Wolf v. Hitchcock, supra.

The plaintiffs challenge the validity of the release. The record, it is said, sustains the charge that it was not obtained "through the usual channels" observed by the Indians in considering matters of this sort, and that signatures thereto were obtained by duress. In addition to this, it is asserted with much confidence that the Indians possessed no knowledge as to the real value of the lands and were ignorant of the provisions of the release, which were not intelligently explained to them, and in any event it was not signed by a majority of the Indians because the women present at the council were not allowed to participate in or sign the same.

From time immemorial the tribal Indians assembled in council. Sometimes the assembly was for the purpose of observing Indian customs and practices in a spirit of celebration; at other times it was for the consideration of tribal affairs, and not infrequently business and celebration were combined. The Indians on the Klamath Reservation met in councils. They were called together in some instances upon their own motion, and upon other occasions by the superintendent of the agency. The United States in negotiating treaties assembled councils, and the statutes of the United States disclose repeated acts of Congress referred for ratification to Indian councils. In later times the Indian council has developed into more settled and established forms of procedure, and the United States, in the matter of legislation affecting Indian lands and funds, has proceeded largely upon the rule of obtaining the assent of the Indians to the legislation enacted. The purpose of so doing is apparent. To withhold from the Indians an opportunity of knowing and expressing their approval or disapproval of the legislation was not intended.

Some fifty Indian witnesses were examined by the plaintiffs. Without exception, they testify that no chairman or secretary of the council held on December 5, 1908, was elected; no proposition was put to a vote by the presiding officer; and that the superintendent of the agency as presiding officer not only did not allow the women present to participate in the meeting but stated to the Indians in substance, "that if they did not accept the $108,750.00 and execute the release in question, they would lose both the land and money—they would get nothing." The release, it is said, was not at this meeting signed by a majority of the Indians present, but signatures thereto were procured by circulating it among individual Indians and soliciting their signatures, many of whom signed without knowing what they were doing.

The burden of proof with respect to duress and misrepresentation proffered to invalidate an instrument under seal is upon the plaintiffs, and when signatories to such a document some nineteen or twenty years later testify with unanimity, and at a time when the prospects of a large judgment appear, that coercion and misrepresentation obtained to procure their signatures, the record thus made loses much if not all of its probative force and falls far short of

reaching that degree of proof essential to establish the charges made. Especially is this true when the release upon its face discloses that some seventy-four Indians signing the same did so by "thumb mark", and most if not all of the same Indians called as witnesses in this case [fol. 55] disclose no advancement in their ability to read or write English.

The failure to observe the details of procedure previously followed by the Indians in conducting a council is not fatal. The predominant questions are, first, was the subject matter to be discussed fully and fairly presented to the assembly; and second, did the Indians understand and know what they were doing? The Superintendent called the council in the usual way. He presided and presented the question of the payment of the money and the release fully and fairly. An interpreter selected by him explained the matter in their native tongue; that he did not resort to any unlawful practice to secure the assent of the Indians is manifest from the fact that he himself was not in sympathy with but opposed to the terms of the settlement. All he did, as he says, was to discharge his duty, and what he said to the Indians was in keeping with the proceedings. Each Indian witness produced by the plaintiffs concedes that knowledge of the fact that they were to receive the amount offered by the United States, in payment for the 87,000 acres taken, obtained. The gist of their evidence centers upon the fact that they relied upon the fairness of the United States to pay what the lands were worth to them, and acted without knowledge of the true value of the same, believing that failure to assent meant a loss of the money and the lands as well.

It is indeed an involved and perplexing problem to analyze a record of oral testimony such as we have here, a record which in practically all instances is incapable of contradiction from any other source than documentary evidence, and hold that because of the differences in experience, learning, congenital habits, and customs between the parties to the transaction, the volume of corroborated oral testimony is sufficient to overcome what positive and contemporary permanent records in writing disclose. At any rate, the method which Congress chose to adopt in consummating this transaction, as evidenced by the legislation, bears the seal of congressional approval as one adopted to

procure a fair, deliberate, and mutual settlement of the controversy. It is, of course, difficult to hold that each Indian signing the release knew precisely what he was doing; that many of them did is evident. Nevertheless, this court, as repeatedly held, is restricted to the rules of law and equity in adjudicating the case, and to the facts we are bound to apply the same. We think, as our findings show, that duress and misrepresentation in procuring the release are not sustained.

We have made the findings after a careful analysis of the record, but inasmuch as in our opinion the special jurisdictional act does not confer upon the court authority to determine the claim, we do not discuss the same. The petition will be dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Green, Judge, concur.

[fol. 56] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 8th day of April, A. D. 1935, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are not entitled to recover.

It is therefore ordered and adjudged that the plaintiffs' petition be and the same is hereby dismissed.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] IN SUPREME COURT OF THE UNITED STATES

STIPULATION RE OMISSION OF EXHIBITS TO PETITION—Filed April 24, 1935.

It is hereby stipulated and agreed that Exhibits 1 and 2 attached to the petition herein may be omitted from the printed record. Exhibit 1 is a copy of the Treaty of October 14, 1864, between the petitioners and the United States, and may be found in 16 Stat. 707. Exhibit 2 is a map which is not needed in the presentation of the case.

G. Carroll Todd, Counsel for Petitioners. Stanley Reed, Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1935

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.